

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**RICHARD E. BAILEY, Deceased**  
Claimant

VS.

**CARGILL, INC.**  
Self-Insured Respondent

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Docket No. 1,015,432

**ORDER**

Decedent's surviving spouse requested review of the February 1, 2007 Award by Administrative Law Judge Bryce D. Benedict. The Board heard oral argument on May 2, 2007.

**APPEARANCES**

Philip R. Carson of Kansas City, Kansas, appeared for the claimant. Frederick L. Haag of Wichita, Kansas, appeared for the self-insured respondent.

**RECORD AND STIPULATIONS**

The Board has considered the record and adopted the stipulations listed in the Award.

**ISSUES**

The Administrative Law Judge (ALJ) awarded the decedent's surviving spouse, Brenda L. Bailey now Brenda L. Miller, workers compensation death benefits. But the ALJ denied the request for an interest penalty against respondent for its failure to pay the death benefits to the surviving spouse at a reasonable time before the Award.

The surviving spouse requests review of whether the ALJ erred in not awarding interest pursuant to K.S.A. 44-512b. The surviving spouse notes the respondent acknowledged during settlement negotiations that the decedent's only dependent was his surviving spouse, Brenda Bailey, and it was not until the prehearing settlement conference that respondent questioned whether Brenda Bailey was the widow and whether there were dependent children. Consequently, the surviving spouse further argues she is entitled to

interest pursuant to K.S.A. 44-512b because respondent failed to timely pay the death benefits without just cause or excuse.

Respondent requests the Board to affirm the ALJ's Award. Respondent argues it was never provided documentation to establish that Brenda Miller was the decedent's surviving spouse and sole dependent until the regular hearing. In the alternative, respondent notes the ALJ ordered a further hearing on the computation of the amount of interest penalty in the event an interest penalty is assessed.

The only issue before the Board is whether the surviving spouse is entitled to receive an interest penalty pursuant to K.S.A. 44-512b.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The decedent, Richard E. Bailey, worked for his own company which cleaned grain bins. Respondent hired decedent to perform that service and in the course of cleaning one of respondent's grain elevators the accident occurred which tragically resulted in decedent's death on September 23, 2003. Brenda L. Bailey filed a Surviving Spouse, Dependent or Heir Application for Hearing on February 23, 2004. The section of the application that provides for designation of surviving spouse, dependents or heirs listed Brenda Bailey, wife, Joshua Bailey a 20-year-old son and Shannon Bailey a 23-year-old daughter.

Initially, respondent questioned whether the decedent was its employee. But by letter dated May 4, 2004, the respondent conceded decedent was a statutory employee and had suffered a compensable injury. Apparently, the letter further contained decedent's average weekly wage information and the comment that, if interested, to forward any settlement offers.<sup>1</sup>

No further activity occurred on the surviving spouse's workers compensation claim for an extended period of time. The surviving spouse's attorney explained the delay in litigation as being occasioned by attempts to obtain respondent's records regarding the circumstances and facts surrounding the decedent's death. Respondent noted that such information was irrelevant for purposes of the workers compensation claim because it had agreed the decedent was an employee and the claim compensable. This inquiry, unrelated to the workers compensation case, was abandoned and the surviving spouse finally proceeded with the death claim.

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<sup>1</sup> R.H. Trans. at 32.

On October 27, 2005, the surviving spouse's counsel responded by letter to respondent's May 4, 2004 letter. The letter requested reimbursement for decedent's funeral expenses as well as the initial \$40,000 death benefit payment. The surviving spouse agreed with respondent's calculation of decedent's average weekly wage and inquired whether respondent was interested in a lump-sum settlement of the remaining weekly compensation benefits.<sup>2</sup>

The record reflects that counsel for the respective parties then had a telephone conversation regarding settlement of the claim. And on December 9, 2005, respondent's counsel sent a letter to the surviving spouse's counsel indicating the surviving spouse was entitled to the initial \$40,000 cash payment and the \$5,000 statutory maximum for funeral expenses. The letter further expressed the understanding that Brenda Bailey was decedent's only heir and extended an offer of a lump-sum payment in lieu of the remaining weekly compensation payments.<sup>3</sup> The surviving spouse's counsel responded by letters requesting additional annuity information and on April 26, 2006, sent a letter to respondent's counsel detailing the compensation already due and requesting a call if respondent would like to make any additional attempts to resolve the case.<sup>4</sup>

On May 8, 2006, a demand for compensation was mailed to the respondent's attorney requesting the \$40,000 lump-sum, \$5,000 for funeral expenses and \$29,237.83 in accrued and unpaid weekly compensation from the date of claimant's death, September 23, 2003, through May 1, 2006, as well as a weekly amount of \$215.65 thereafter. The respondent's counsel received the demand on May 10, 2006, and apparently responded by letter dated May 11, 2006, with another offer to lump sum the weekly compensation payments. The surviving spouse's counsel, by letter dated June 13, 2006, rejected the offer and enclosed a copy of an application for penalties. It was noted that the application would not be set for hearing if respondent would pay the past due compensation. The letter further noted that there was still a possibility that an agreement could be reached to lump sum the remaining future weekly payments. On June 14, 2006, the application for penalties was filed by the surviving spouse's attorney requesting interest on the compensation due and unpaid.

A prehearing settlement conference was held on November 14, 2006. The respondent admitted the decedent suffered an accidental death arising out of and in the course of his employment with the respondent. The parties also stipulated to an average weekly wage of \$323.46.<sup>5</sup> It was at the prehearing settlement conference that respondent

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<sup>2</sup> *Id.*, Cl. Ex. 6.

<sup>3</sup> *Id.*, Cl. Ex. 7.

<sup>4</sup> *Id.*, Cl. Ex. 8.

<sup>5</sup> *Id.* at 7.

first raised the issues whether Brenda Bailey was the surviving spouse and whether there were dependent children. When the surviving spouse had previously requested and later demanded payment of death benefits those issues had never been raised by respondent. Despite its professed concerns about the proper or additional parties, the respondent sent a check to the surviving spouse's attorney dated November 22, 2006, for \$42,898.95 which included the statutory maximum of \$5,000 for decedent's funeral expenses.

The regular hearing was held on December 28, 2006. Brenda L. Miller testified she married Richard E. Bailey on December 22, 1979, and was still married at the time of the decedent's death on September 23, 2003.<sup>6</sup> Brenda and Richard had two children, Shannon Lea who was born on May 19, 1980<sup>7</sup>, and Joshua Eugene who was born on April 26, 1983<sup>8</sup>. Both children, 23 and 20 years old, were no longer dependents at the time of the decedent's death because they both had graduated from high school and did not seek a college education. Brenda Miller also provided a notarized affidavit<sup>9</sup> to the court as proof that she was Brenda Bailey.

The ALJ rendered his decision on February 1, 2007, awarding the decedent's wife full death benefits. But the ALJ denied an interest penalty pursuant to K.S.A. 44-512b. The ALJ noted that if respondent seriously questioned whether Brenda Bailey was decedent's surviving spouse it could have requested her attorney to provide the necessary documentation. Conversely, the surviving spouse's attorney engaged in inquiry regarding issues unrelated to the workers compensation claim and then engaged in settlement negotiations but never moved the case forward. The ALJ concluded the claimant's failure to press the issues was the most significant factor in the delayed payment of benefits. Consequently, the ALJ denied the request for an interest penalty.

An interest penalty may be awarded when an employer or its insurance carrier without just cause or excuse fails, before an award, to pay compensation. K.S.A. 44-512b provides:

(a) Whenever the administrative law judge or board finds, upon a hearing conducted pursuant to K.S.A. 44-523 and amendments thereto or upon review or appeal of an award entered in such a hearing, that there was not just cause or excuse for the failure of the employer or insurance carrier to pay, prior to an award, the compensation claimed to the person entitled thereto, the employee shall be entitled to interest on the amount of the disability compensation found to be due and unpaid

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<sup>6</sup> See Ex. 1.

<sup>7</sup> See Ex. 3.

<sup>8</sup> See Ex. 4.

<sup>9</sup> See Ex. 5.

at the rate of interest prescribed pursuant to subsection (e)(1) of K.S.A. 16-204 and amendments thereto. Such interest shall be assessed against the employer or insurance carrier liable for the compensation and shall accrue from the date such compensation was due.

(b) Interest assessed pursuant to this section shall be considered a penalty and shall not be considered a loss or a loss adjustment expense by an insurance carrier in the promulgation of rates for workers compensation insurance.

(c) This section shall be part of and supplemental to the workers compensation act.

At the regular hearing the respondent's counsel argued that even if an agreement had been reached in the settlement negotiations the respondent would not have made a payment without documentary evidence that Brenda Bailey was the surviving spouse and sole dependent. But respondent's counsel admitted that the surviving spouse was not informed that was a problem until the prehearing settlement conference.

MR. HAAG: Well, I think the claimant's got the clear burden of proof under the statute. They have to furnish the evidence. We didn't receive it and we could not - - I could not, in good conscience, tell my client to pay a claim to a lady who's not provided any indication at all, any written documentation in the form of an affidavit or a marriage certificate or anything else to establish her claim to compensation. Your Honor - -

JUDGE BENEDICT: On the other - -

MR. HAAG: Your Honor could - -

JUDGE BENEDICT: On the other hand you never told them that was a problem, did you - -

MR. HAAG: No.

JUDGE BENEDICT: - - until the prehearing?

MR. HAAG: I kept thinking they'd have a hearing on it. I mean, is it my job to tell the claimant attorney schedule a hearing? I mean, I don't think so. Why are we here today instead of three years ago? If you've got any more questions, I'd be - - I mean, I feel pretty strongly about this, and Mr. Carson I'm sure does, too, on his own behalf, but I think they're pointing the fingers the wrong direction in this case without wanting to take any responsibility or co-responsibility for why we're here three years and three months later instead of three months, six months later and get the whole darn thing - - this should never have happened, never should be here. I totally agree with that today - -<sup>10</sup>

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<sup>10</sup> *Id.* at 35-36.

The surviving spouse's counsel noted that during all the discussions regarding a lump-sum settlement of the weekly benefits the respondent had never requested documentary evidence to establish dependency and never raised the issue until the prehearing settlement conference.

JUDGE BENEDICT: So, Mr. Carson, when were you first aware that they thought that this woman beside you is not Mr. Bailey's wife?

MR. CARSON: November 14th at the prehearing settlement conference.

JUDGE BENEDICT: Prior to that conference had you ever demanded any payment by the respondent?

MR. CARSON: Yes, sir.

JUDGE BENEDICT: And at that time did they inform you we are not going to pay it because we don't think that this woman is his wife?

MR. CARSON: No, sir.

JUDGE BENEDICT: Did you receive any explanation as to why they were not going to provide any money?

MR. CARSON: No, sir.<sup>11</sup>

The parties engaged in ongoing settlement discussions until the May 8, 2006 demand for payment was sent to respondent's counsel. And there were further discussions regarding the potential for a lump-sum payout of the remaining weekly benefits after the surviving spouse demanded the benefits that had accrued to that date. Respondent argues that until it had proof that Brenda Bailey was the decedent's surviving spouse and sole dependent it could not be expected to make any payments. But in light of the \$42,898.95 check dated November 22, 2006, and received by the surviving spouse's counsel on December 4, 2006, such an argument fails. At the regular hearing the respondent's counsel noted that it had never received the documentation to establish dependency, nonetheless, the November 22, 2006 check was prepared and sent to the surviving spouse's counsel before the December 28, 2006 regular hearing where those documents were introduced as evidence.

Respondent was aware that the surviving spouse was demanding the accrued unpaid benefits that she was entitled to receive. If there was any question whether Brenda Bailey was the surviving spouse respondent could have apprised her attorney what documentation it needed. Nothing was done until after the prehearing settlement

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<sup>11</sup> *Id.* at 11.

conference when the respondent, for unexplained reasons, sent a check for \$42,898.95 which was received by the surviving spouse's counsel on December 4, 2006.

Before interest may be awarded there must be an absence of just cause or excuse for failing to pay benefits before the award. K.S.A. 44-510b provides the initial payment of \$40,000 is immediately due and payable to the surviving legal spouse or dependent children or both. And the initial payment is not subject to discount.<sup>12</sup> As previously noted by letter dated December 9, 2005 the respondent agreed Brenda Bailey was the surviving spouse and sole dependent. Likewise it was agreed the maximum funeral expense of \$5,000 was also due. Here, the respondent has not expressed a legitimate argument in its defense and, therefore, just cause for not paying benefits. If it needed further documentary evidence to establish dependency it could have requested that information but it did not. The Board finds that respondent did not have just cause to fail to pay the benefits before the award and, accordingly, the request for an interest penalty is granted.

Before the regular hearing the ALJ, after a telephone conference with the parties, had quashed the deposition of a certified public accountant who was apparently going to testify regarding the appropriate method to compute the interest penalty. Such calculation is somewhat complicated by the weekly benefit payments which become due on weekly sequential dates. The ALJ quashed the deposition and by letter noted that if an interest penalty was assessed the computation of that amount would be the subject of an additional hearing if the parties could not otherwise agree. At the regular hearing the ALJ reiterated that in the event a penalty was assessed an additional hearing would be held to address the appropriate manner to calculate the penalty amount. Consequently, this case is remanded to the ALJ for determination of the interest penalty amount.<sup>13</sup>

Finally, in a supplemental brief to the Board, the surviving spouse's attorney argued that respondent's failure to promptly pay the past due death benefits potentially violated K.S.A. 44-5,120. K.S.A. 44-5,120(d) provides:

Fraudulent or abusive acts or practices for purposes of the workers compensation act include, willfully, knowingly or intentionally:

(14) failing to tender promptly full death benefits if a clear and legitimate dispute does not exist as to the liability of the insurance company, self-insured employer or group-funded self-insurance plan;

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<sup>12</sup> See K.S.A. 44-510b(a).

<sup>13</sup> It is also necessary to remand for additional evidence to detail what the \$42,898.95 check was intended to pay. The parties agreed that it included the \$5,000 statutory maximum funeral expense but no further explanation was provided regarding the remaining sum.

The procedure to file a complaint under K.S.A. 44-5,120 is set out in K.S.A. 44-5,122(b). And, simply stated, the Board does not have jurisdiction to address that complaint.

**AWARD**

**WHEREFORE**, it is the decision of the Board that the Award of Administrative Law Judge Bryce D. Benedict dated February 1, 2007, is modified to award an interest penalty and remanded to the ALJ for a hearing and determination of the sum of the penalty.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of June 2007.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Philip R. Carson, Attorney for Claimant  
Frederick L. Haag, Attorney for Respondent  
Bryce D. Benedict, Administrative Law Judge